Capitalcorp Securities Sdn Bhd v Kweh Chen Seng & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D6–22–582 OF 1999
REKHRAJ J
3 APRIL 2000

Contract *— Estoppel — Settlement agreement — Original cause of action replaced by settlement agreement — Plaintiff reverted to original cause of action — Whether plaintiff could plead fraud when defendant breached settlement agreement — Whether plaintiff could revert to original cause of action — Whether original cause of action destroyed by novation agreement*

Contract *— Settlement — Rescission of — Settlement executed but defendants defaulted in payments — Settlement provided for transfer of cause of action from first defendant to second and third defendants — Whether plaintiff could rescind settlement agreement and pursue first defendant for debt due — Whether second and third defendants liable as guarantors*

The first defendant had offered to settle an outstanding sum owing to the plaintiff by way of a cheque dated 20 May 1998, monthly installments and transferring a piece of land free of all encumbrances. The parties also entered into a mutual letter of undertaking that upon execution of the letter, each party should have no claims whatsoever and that the settlement proposal shall be the full and final settlement of accounts. The plaintiff also agreed that in the event the settlement proposal could not be carried out, the plaintiff would, inter alia, proceed against the drawers of the cheque, the land owner and against the guarantors, the second and third defendants. The cheque of 20 May 1998 was dishonored on 16 July 1998. The plaintiff alleged that the first defendant perpetrated fraud upon them. The plaintiff made a demand upon the second and third defendants, and then notified the first defendant that the mutual letter of undertaking was rescinded when the demand upon the second and third defendants was ignored. The first defendant applied the court that the plaintiff's claim be dismissed. The senior assistant registrar refused to strike out the plaintiff's claim. At the appeal, the first defendant admitted to the debt but stated that, inter alia, the plaintiff's cause of action had been compromised under the settlement agreement and the letter of mutual undertaking, and that the plaintiff's recourse was against, inter alia, the second and third defendants, and that the parties to the settlement were sui juris.

Held, dismissing the plaintiff's claim against the first defendant with costs:

The plaintiff's conduct in electing to proceed simultaneously against the other defendants under the compromise agreements, and against the first defendant was an act of approbating and reprobating the same instrument to its liking. The parties were sui juris, and they had

entered into the contract with full knowledge of the terms in the compromise. The plaintiff was estopped from alleging contrary facts by pleading fraud. The doctrine of estoppel prevented the plaintiff from reverting to the original cause of action which had been destroyed by the novation agreement. The plaintiff's conduct in having proceeded with a cause of action against the guarantors under the compromise agreement was a step taken in affirmation of that document, and by that conduct, the cause of action of the plaintiff against the first defendant had been defeated and instead was transferred against the second and third defendants (see p 704A–C).

[Bahasa Malaysia summary

Defendan telah membuat satu tawaran untuk menjelaskan sejumlah wang yang tertunggak kepada plaintif melalui cek bertarikh 20 Mei 1998, ansuran bulanan dan dengan memindah milik sebidang tanah yang tidak dibebankan. Parti-parti juga telah memasukki suatu surat akujanji bersama bahawa setelah surat tersebut dilaksanakan, parti-parti tidak mempunyai sebarang tuntutan sesama sendiri, dan cadangan penyelesaian tersebut merupakan penyelesaian penuh dan muktamad akaun tersebut. Plaintif juga telah bersetuju bahawa, jikalau cadangan penyelesaian tidak dapat dilaksanakan, plaintif akan menuntut terhadap penyuruh bayar cek, pemilik tanah tersebut dan terhadap penggerenti-penggerenti, iaitu defendan-defendan kedua dan ketiga. Cek bertarikh 20 Mei 1998 telah tidak dilayan pada 16 Julai 1998. Plaintif telah menyatakan bahawa defendan pertama telah melakukan fraud terhadapnya. Plaintif telah menuntut terhadap defendan-defendan kedua dan ketiga, dan telah memberitahu defendan pertama bahawa surat akujanji bersama tersebut telah dibatalkan kerana tuntutan terhadap defendan-defendan kedua dan ketiga tidak dipedulikan. Defendan pertama telah memohon kepada mahkamah supaya tuntutan plaintif ditolak. Semasa rayuan, defendan pertama mengaku terhadap hutang tersebut tetapi menyatakan bahawa, inter alia, kausa tindakan plaintif telah dikompromi di bawah persetujuan penyelesaian dan surat akujanji bersama, dan plaintif hanya dapat menuntut terhadap defendan-defendan kedua dan ketiga, dan parti-parti kepada penyelesaian tersebut adalah sui juris.

Diputuskan, menolak tuntutan plaintif terhadap defendan pertama dengan kos:

Perbuatan plaintif dalam memilih untuk menuntut terhadap defendan-defendan lain di bawah perjanjian-perjanjian kompromi, dan terhadap defendan pertama merupakan tindakan aprobat dan reprobat suratcara yang sama mengikut sesuka hati. Parti-parti adalah sui juris dan telah memasukki perjanjian tersebut dengan mengetahui tentang terma-terma dalam kompromi. Plaintif telah diestop daripada mengatakan fakta-fakta yang bertentangan dengan memplikan fraud.

A Doktrin estopel telah mencegah plaintif daripada kembali kepada kausa tindakan yang asal yang telah dibatalkan oleh perjanjian novasi. Perbuatan plaintif dalam meneruskan kausa tindakan terhadap penggerenti di bawah perjanjian kompromi merupakan langkah yang diambil untuk mengesahkan dokumen tersebut, dan melalui perbuatan tersebut, kausa tindakan plaintif terhadap defendan pertama telah dikalahkan dan telah dipindahkan terhadap defendan-defendan kedua dan ketiga (lihat ms 704A–C).]

Notes

For cases on estoppel, see 3(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2659–2683.

For cases on settlement, see 3(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3780–3788.

Cases referred to

Mc Callum v Country Residences Ltd [1965] 2 All ER 264 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)

TJ Su (*KL Pang* with him) (*Chean Teh & Su*) for the defendant/appellant.

Gideon Tan (*YC Chin* with him) (*Gideon Tan Razali Zaini*) for the plaintiff/respondent.

Rekhraj J: The plaintiff is a stock broking company, and as such, brought a cause of action against the first defendant upon a written agreement entered into between the first plaintiff on the one part and the first defendant on the other part, wherein for the consideration stated therein, agreed to open a margin trading account for and in the name of the first defendant for the purposes of buying and selling of shares.

As at 2 July 1998, a sum of RM1,497,434.50 was due and owing from the first defendant. By a letter dated 2 July 1998, the first defendant offered to settle the outstanding sum on the terms and conditions:

(a) RM500,000 by way of cheque No PBB 069452 and dated 20 May 1998 ('the said cheque');

(b) 12 monthly instalments of RM35,000 each by way of post dated cheques; and

(c) transferring of land bearing Title Deed No 19320 Lot No 9025, Mukim of Ampangan, District of Seremban, free of all encumbrances ('Seremban land').

In addition to the above, the first defendant requested of the plaintiff to enter into a mutual letter of undertaking to the effect that:

> Capitalcorp Securities Sdn Bhd (the plaintiff herein) and Kweh Chen Seng (the first defendant herein) hereby mutually undertake that upon the execution of this letter of mutual undertaking, each party (hereto) shall have no further claims whatsoever and howsoever including but not limited to statutory claims, legal actions and/or bankruptcy proceedings against the other, ... and that the settlement proposal dated 2 July 1998, under the said guarantee and indemnity given by Yap Hock Seng and Chew See Yow (the second and third defendants respectively) and duly accepted by Capitalcorp Securities Sdn Bhd (the plaintiff) shall be the basis of the full and final settlement of account ...; and Capitalcorp Securities Sdn Bhd undertakes to fully absolve and discharge Kweh Chen Seng (the first defendant) from all liabilities, debts and obligations arising howsoever and whatsoever.

The above settlement was not only duly accepted by Capitalcorp Securities Sdn Bhd, but it was further agreed that in the event the cheque for RM500,000 or the agreement to pay twelve monthly instalments of RM35,000 each was dishonoured or the land title deed bearing registration No 19320 Lot No 9025 Mukim of Ampangan, District of Seremban could not be transferred to Capitalcorp Securities Sdn Bhd for any reason whatsoever, Capitalcorp Securities Sdn Bhd shall (then) proceed:

(i) to dispose the 152,000 shares of Kwai Peng;

(ii) and 30,000 Ipmuda warrants to settle the account;

(iii) to have recourse only against the drawers of the cheque;

(iv) and (against) the guarantors, under their guarantee/indemnity; and

(v) against the land owner and guarantors for the non-transfer of the said land.

The said letter of mutual undertaking was signed by Ibrahim Yaacob as the Chief Executive Officer for and on behalf of Capitalcorp Securities Sdn Bhd, and by Kweh Chen Seng — the first defendant, on 15 July 1998.

The plaintiff accepted all the said terms of the first defendant on 15 July 1998, and whereupon the second and third defendants, in consideration thereof, executed the said guarantees and indemnities; and further undertook to pay to the plaintiff the debt owing on demand, if in the event and for any reason whatsoever, the first defendant did not observe and perform all the terms of the settlement proposal.

Upon the completion of the required documentations by the parties, the plaintiff on 16 July 1998, presented the cheque hereinabove for clearance only to be dishonoured with remarks 'account closed' on 16 July 1998.

The plaintiff now complains that the first defendant had perpetrated fraud upon them by not honouring the cheque and had fraudulently induced the plaintiff into the terms of the settlement; and the execution of the letter of undertaking.

The plaintiff, on 28 July 1998, made a demand upon the second and third defendants under their guarantee/indemnity and when those demands were neglected with the payment, the plaintiff then on 15 September 1998, notified to the first defendant that the agreement and the mutual letter of

undertaking, as executed, were rescinded and thus making a demand upon the first defendant in the sum of RM1,497,434.50 with interest and costs.

The first defendant not only filed his defence but also counterclaimed against the plaintiff; and had it followed up with a summons in chambers (encl 6) for an order pursuant to O 18 r 19(1) of the Rules of the High Court 1980, and/or under the inherent jurisdiction of the honourable court for a prayer that the claim and action against him be dismissed with costs on the grounds that the claim and the action against him has been compromised by the plaintiff, and the plaintiff has undertaken to save harmless the first defendant from any and all claims and actions.

The senior assistant registrar refused to strike out the plaintiff's claim against the first defendant thus resulting in an appeal to the judge in chambers.

At the hearing of the appeal, the first defendant admitted to the debt of the plaintiff by virtue of the admissions made in the settlement agreement dated 15 July 1998, but averred that:

(i) the plaintiff's cause of action against the first defendant has been compromised under the settlement agreements dated 2 July 1998, and the letter of mutual undertaking; and

(ii) in the execution of the guarantee/indemnity given in favour of the plaintiff by the second and third defendants; the legal effect of which was, that in the event of default or breach of the terms of the compromise agreement, the plaintiff's only recourse, if any, was against:

(a) the drawer of the cheque;

(b) the land owner of the secured property;

(c) the two guarantors; and not against the first defendant who had been discharged of his liability, in consideration of the compromise agreement in that 'when the action was compromised by an agreement (novation agreement) to pay a sum in satisfaction, it gave rise to a new cause of action ... The plaintiff, in order to succeed to judgment, has now to sue on the novation agreement against the second and third defendants', *McCallum v Country Residences Ltd* [1965] 2 All ER 264 at p 265 (CA).

Further, the parties to the compromise or settlement were sui juris, and therefore the settlement or compromise so entered into between them had constituted a new and independent agreement, made for a good and valuable consideration, the full effect of which was to put an end to the earlier cause of action which became spent and exhausted, unless the parties to the proceedings herein had reserved for themselves the liberty to enforce the original cause of action or claim in the event the compromise agreement was vitiated; and which they had failed to do so. Instead, the plaintiff took steps and proceeded, upon the dishonouring of the cheque, to affirm the compromise by:

(i) issuing a demand on the guarantor on their guarantee/indemnity; and

(ii) proceeded to lodge a caveat against and over the Seremban land.

The plaintiff's conduct in electing to proceed simultaneously against the other defendants under the compromise agreements, and against the first defendant was an act of approbating and reprobating the same instrument to its liking.

As I said earlier, the parties being sui juris, and they having entered into the contract with full knowledge of the terms in the compromise, the plaintiff is now estopped from alleging contrary facts by pleading fraud. The doctrine of estoppel now prevents the plaintiff from reverting to the original cause of action which has now been destroyed by the novation agreement.

The plaintiff's conduct in having proceeded with a cause of action against the guarantors under the compromise agreement was a step taken in affirmation of that document, and by that conduct the cause of action of the plaintiff against the first defendant has been defeated and instead is transferred against the second and third defendants.

I accordingly held that the plaintiff had voluntarily whittled away their cause of action against the first defendant. The plaintiff's claim against the first defendant was dismissed with costs. Upon the dismissal of the plaintiff's claim, the first defendant elected to withdraw the counterclaim against the plaintiff. Costs of RM2,000 was awarded in lieu of taxation.

Plaintiff's case against the first defendant dismissed with costs.

Reported by Chew Phye Aun